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No. _____ .

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ABELE ASSOCIATES, a Pennsylvania limited Partnership

PETITIONER

v.

THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

ALPERN & ALPERN
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Counsel for Petitioner
*Counsel of Record

21 pp

QUESTION(S) PRESENTED

Did the Special Masters constituting the Board of Viewers who heard this case below have such bias or prejudice against your Petitioner; the same being founded on personal knowledge of the Special Masters of disputed evidentiary facts, so that your Petitioner was denied due process pursuant to the 14th Amendment of the Constitution of the United States?

LIST OF PARTIES

Board of Property Assessment Appeals & Review

Allegheny County, Pennsylvania

South Fayette Township

South Fayette Township School District

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the highest state Court to review the merits appears at Appendix A to the Petition and is unpublished.

The Opinion of the Board of Viewers acting on behalf of the Board of Property Assessment, Appeals and Review appears at Appendix B and is unpublished.

The Opinion of The Court of Common Pleas of Allegheny County, Pennsylvania affirming the report of the Special Masters (Board of Viewers) appears at Appendix C and is unpublished.

JURISDICTION

The date on which the highest state Court decided this case was April 21, 1995, a copy of that decision appears at Appendix A.

A timely petition for Reargument was thereafter denied on the following date: May 31, 1995. A copy of the Order denying Reargument appears at Appendix D.

A timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was thereafter denied on the following date: March 12, 1996, and a copy of the Order denying such allowance appears at Appendix E.

An Extension of Time to file the Petition for a Writ of Certiorari was granted to and including July 25, 1996 on May 28, 1996 in Application No. A-967.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment of the Constitution of the United States provides, inter alia:

> "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of The United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

American Bar Association Code of Judicial Conduct; Cannon 3E(1) paragraph (1):

> "a Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to instances where:
>
> (a) "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding..."
>
> Cannon 3B(7):
>
> "...A judge shall not initiate, permit or consider ex-parte communications, ...concerning a pending or impending proceeding..."

STATEMENT OF THE CASE

The Opinion of the Special Masters, being The Board of Viewers and set forth in Appendix B contains statements that reveal the bias of the Board of Viewers against your Petitioner. That bias is founded on knowledge of disputed evidentiary facts concerning the real property involved from an extra judicial source (or sources) indicating Ex-parte communications and/or investigations contrary to Cannons 3E(1) and 3B(7) of the Code of Judicial Conduct. Both the bias and the knowledge denied your Petitioner's right to due process pursuant to the 14th Amendment of the Constitution of the United States.

Your Petitioner owns real estate in South Fayette Township, Allegheny County, Pennsylvania. The property is assessed for real estate tax purposes to be taxed by the County, the Township and the Township's School District. This case began as an Appeal by Your Petitioner from a real estate tax assessment valuation by the Allegheny County Board of Tax Assessment, Appeals and Review which your Petitioner considered to be higher than permitted by applicable law.

The real estate tax appeal was heard by a Board of Viewers sitting without a jury and as "Special Masters" which Board has the same jurisdiction as the Court of Common Pleas of Allegheny County (the Court of original Jurisdiction in the Commonwealth of Pennsylvania). The function of the Board was to find an assessed value of the Property (based on a percentage of market value) from the testimony and evidence presented before it.

The statements in the opinion of the Board of Viewers which indicate a bias against your Petitioner and personal knowledge of evidentiary facts in dispute are as follows:

On page 25 of the Masters' Report (see Appendix B) under paragraph (d) location factor, the Masters state:

> "There is a rote expression in the expert real estate appraisal vernacular that the three most important factors in determining market value are LOCATION, LOCATION, LOCATION. We are agreed on the importance of this factor, neither of appellants' witnesses presented any testimony to describe the subject property's location, and many factors which make it desirable for business investment. Your Masters know the site...
>
> From public Records, it is seen as a small one square mile borough with a 1990 population of 5,443. It has been a satellite town housing the labor force and businesses surrounded by some major industries since World War I and, very important in World War II. (sic?) I-79 has brought growth to the surrounding township...
>
> We conclude and find that the subject property is a prime location for business investment superior to Nell's Business Park." (emphasis supplied)

The second statement in the Opinion of the Masters that indicates a bias and an ex-parte communication occurs on page 30 of the

Report (Appendix B) where the Masters state:

> "The subject land and modular prefabricated buildings are in a business park contiguous to a fast growing area... The buildings are targeted for a special class of professional and small businesses." (emphasis supplied)

The third place in the Opinion where the Masters indicate bias, extra judicial knowledge and Ex-parte communications is in the very last statement of the Report (Appendix B p. 45):

> "In concluding our recommendations, we give consideration to the fact that Nell made appropriate personal opinion factor, percentage reduction adjustments considering the larger size and construction quality of his RIDC comparable buildings. Through we sustain Nell's market value recommendations, we also must note that we made no upward adjustment in market value for the superior location factor of Abele Business Park to meet the owner's target market, which in our opinion would not be fully serviced by the RIDC location." (emphasis supplied)

As stated in the Opinion of the Masters the principal witnesses who testified at the trial were the general partner of Your Petitioner (the owner of the property) one, William G. Corace, Abele's real estate appraiser, E. Lewis Averbach and the real estate appraiser of the South Fayette Township School District, Robert B. Nell, Jr. In the transcript of the hearing there is no

testimony by any of the witnesses concerning the location of the subject property (although real estate appraisers do testify as to the value of "comparable properties" and included in the concept of a "comparable property" is the opinion of the appraiser who must determine when he selects a "comparable property", that the location of the "comparable property" is, in his personal opinion reasonably equivalent to that of the property being appraised).

In the first extract from the "Masters Report" set forth above the Masters emphasize the location of the property. They specifically state that they "know the site" and find that the "subject property is a prime location for a business investment superior to Nell's Business Park". <u>There are no facts in the Record that support any of these statements by the Master</u>.

At no time did the Masters reveal to any of the parties in this case that they had any familiarity with the Abele site, that they knew the site, that they considered it a "prime location" (whatever the Masters may think that phrase means) or that "I-79 has brought growth to the surrounding township..." The only way the Master would know this information would be from ex parte communications from persons unknown to the parties appearing before them.

The Masters' conclusion concerning the subject property's "prime location" constitutes a direct statement of bias. If Abele's property has a prime location it must have a very high value.

In reviewing the quoted language, for the

Masters to make the statements concerning knowing the site and finding the property to be a "prime location" immediate questions and red flags are raised concerning what the Masters' are stating. What is it that the Masters' are saying when they state that they know the site? Do they know it in a geographical sense? Do they know it in an economic sense? Just what knowledge do they have that is separate or apart from the knowledge that was communicated in the testimony of the witnesses or the documentary evidence submitted as evidence? What facts do the Masters know that render the Abele property a prime location "superior" to Nell's Business Park? (Mr. Nell in his appraisal used comparable property from a Business Park located approximately 15 miles from the subject property). There is no evidence on the Record that would or could drive the Masters to reach such a judgment. These facts could only come from some ex parte knowledge or communication not divulged to the parties litigating before the Masters.

The second quote from the Masters' Report is more egregious than the first in demonstrating a bias. The Masters state that the subject land and building are located "contiguous to a fast growing area..." and that the buildings are "targeted for a special class of professional and small businesses." There is no statement in the Record as to what area the subject property is contiguous to nor is there any statement that it is fast growing. It is significant that there was no opportunity to examine the Masters on whether or not their statement concerning the fast growing area would help or hinder, increase or decrease, the value of the subject property.

With regard to the statement as to the market for leasing the space in the Abele property when reviewing the Record in this case this statement constitutes a mis-statement of the only facts concerning the useof the buildings.

Although not before this Court, in the transcript of the testimony and evidence, William G. Corace had introduced an Exhibit which stated that the buildings on the subject property constituted "flex-space" being a combination of office and warehouse space with a majority of non-office space. There is no mention that the buildings could be used for professional offices whatsoever. Further, the statement in the Masters' report presumes extra judicial knowledge concerning the Taxpayer's assumed marketing program for the property. Where did the Masters get this specialized knowledge? Is this knowledge in any way accurate? Although not directly stated the quotation from the Masters' report indicates a strong belief that the taxpayer could just as easily be operating a high yield gold mine as a real estate development of rental properties.

The last quote from the Masters' Report indicates the most evident effect of the Masters' bias. By stating that "...we made no upward adjustment in market value for the superior location factor of Abele Business Park to meet the owner's target market..." the Masters are stating that only through restraining their bias (based on information not on the Record) did they not find a value not exceeding that already found by the appraiser for the taxing body. Such restraint is admirable but fails to demonstrate an objective and impartial Judiciary.

The bias shown in the Masters' Report and based on extra judicial knowledge should not be permitted to stand.

REASONS FOR GRANTING THE PETITION

On Certiorari the Supreme Court of the United States considers cases where a State Court has decided an important Federal question in a way that conflicts with relevant decisions of the Supreme Court of The United States. In In Re Murchision, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) this Court stated:

> "A fair trial and a fair tribunal is a basic requirement of Due Process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a Judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision, circumstances and relationships must be considered. ...[T]hus the Judge whom Due Process requires to be impartial in weighing the evidence before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be trusted by adequate cross examination." (Emphasis supplied).

A case with a more similar bias to that in this case occurs in Johnson v. Mississippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed. 2d 423 (1971). In Johnson, the trial Judge had a

bias against both civil rights litigants and lawyers. The Judge found a lawyer in contempt without a hearing. In a short opinion reversing the judgment below and remanding the case for a hearing on the counsel's alleged contempt, this Court wrote:

> "Trial before an unbiased Judge is essential to due process."

The American Bar Association Code of Judicial Conduct, if followed, should be sufficient to prevent the kind of bias that exists in this case. The Special Masters with extra judicial and ex parte knowledge should have disqualified themselves or, at least, advised the parties that they had such knowledge so that a timely Motion for Recusal could have been filed and heard. Unfortunately your Petitioner is now in a position where it must attempt to right a constitutional wrong after the wrong has been visited on it, rather than take the preventive action that should have taken place.

In Judicial Disqualification by Richard E. Flamm, Little Brown and Company, 1996 Mr. Flamm writes at 334:

> "Litigants are entitled to have their case decided by a Judge who can approach that case in an objective or impartial manner; a Judge who possesses personal knowledge of the evidentiary facts in dispute may not be able to meet this criterion. When a Judge or other judicial officer has personal knowledge of disputed evidentiary facts that has been acquired through an extra judicial source...state...authorities, as well as

the Code of the Judicial Conduct, prescribe disqualification."

The two judicial cannons that are involved in this case are 3E(1) and 3B(7). Cannon 3E(1) is:

> "(1) a Judge should disqualify himself in a proceeding in which his impartiality might be in question, including, but not limited to instances where:
>
> (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;..."

As stated above the Special Masters had personal knowledge of the location of the subject property as well as a personal bias as to the value of that location and the use to which your Petitioner has, in the Masters' minds, used the property.

Judicial Cannon 3B (7) is:

> "...a Judge shall not initiate, permit or consider ex parte communications, ...concerning a pending or impending proceeding..."

There is no way that the Masters in this case could have obtained the knowledge expressed in their opinion without ex parte communications.

Flamm applies this Cannon at page 326, regarding disqualification, as follows:

"As a general rule, however, to provide a legally cognizable ground for disqualification, a Judge's factual knowledge must be of evidentiary facts that are actually in dispute, and acquired outside the course of judicial proceedings that have been conducted before him."

Such ex-parte knowledge is evident in this case.

In Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed. 2d 182 (1980) Justice Marshall wrote:

> "Indeed, justice must satisfy the appearance of justice...and this stringent rule may sometimes bar trial by Judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."

In the case before this Court the appearance is one of injustice not justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALPERN AND ALPERN

David F. Alpern

David F. Alpern

DATE: July 24, 1996

Supreme Court, U.S.
FILED

96 136 JUL 25 1996

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ABELE ASSOCIATES, a Pennsylvania limited Partnership

PETITIONER

v.

THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COMMONWEALTH COURT OF PENNSYLVANIA

APPENDICES

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APPENDIX "A"

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ABELE ASSOCIATES, Pennsylvania Limited Partnership, Appellant	:	
v.	:	No.1556C.D. 1994
THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW	:	ARGUED: March 14, 1995
ASSESSMENT, APPEALS AND REVIEW	:	

BEFORE: HONORABLE DORIS A. SMITH, JUDGE
HONORABLE DAN PELLEGRINI, JUDGE
HONORABLE EMIL E. NARICK, SENIOR JUDGE

OPINION NOT REPORTED

MEMORANDUM OPINION BY SENIOR JUDGE NARICK FILED: April 21, 1995

Abele Associates (taxpayer) appeals from an order of the Court of Common Pleas of Allegheny (trial court) which overruled the taxpayer's objections to a report of court-appointed Special Masters (Masters). We affirm.

Allegheny County initially assigned the taxpayer's property an assessed value of $405,000 based on the fair market value of $1,620,000 for the year 1990. Therefore, taxpayer filed an appeal to the Board of Property Assessment, Appeals and Review (Board) which reduced the aforementioned assessed value to $326,500 based upon a fair market value of $1,306,000. Taxpayer appealed to the court who assigned the Masters to conduct a hearing and prepare a report. The Masters' Report further reduced the value of

the property to an assessed value of $300,000 based upon a fair market value of $1,200,000.[1] Taxpayer filed objections to the Masters' Report, which the trial court overruled.

The taxpayer raises three issues on appeal before this Court.[2] First taxpayer argues that the Masters improperly determined the credibility of witnesses, as the Masters' findings did not "conform to reasonable standards." Specifically, taxpayer objects to the Masters' findings concerning the testimony of two witnesses presented by the taxpayer, E. Lewis Averbach and William G. Corace.[3]

The Masters found that taxpayer's expert witness Averbach was impeached on six specific instances, exposing oversights and exclusions concerning the property in question. Also,

---

[1]The Masters also received evidence and assigned values for the years 1991 through 1993 inclusive.

[2]In a tax assessment appeal, our scope of review is limited to determining whether an error of law has been made, findings of fact are supported by substantial evidence or whether the trial court abused its discretion. Cedarbrook Realty, Inc. v. Cheltenham Township, 148 Pa. Commonwealth Ct. 310, 611 A.2d 335, appeal denied, 533 Pa. 637, 621 A.2d 582 (1992).

[3]Averbach is a licensed real estate broker and appraiser who was qualified as an expert witness for taxpayer and Corace is a general partner who was identified as a part owner, builder and developer of the property at issue in this case.

BEST AV

the Masters discounted taxpayer's witness Corace's testimony concerning the purported value of the property because Corace failed to include any evidence to prove what the current market value of the property would be. This Court has continually held that a trial court's function in a tax assessment case is to properly weigh conflicting testimony and values proposed by expert witnesses and to arrive at a fair market value based upon the credibility of their opinions. County of Monroe v. Bolus, 149 Pa. Commonwealth Ct. 458, 613 A.2d 178 (1992).[4] Our review of the record demonstrates that the Masters weighed the conflicting evidence and reached a permissible credibility determination.

Second, taxpayer argues that the Masters erred in not adopting the "income approach"[5] to determine the fair market value of the property in question. Taxpayer seemingly argues that the "income approach" method is the only valuation method applicable here, and that the application of any other method is

---

[4]See also Appeal of the City of Pittsburgh, 115 Pa. Commonwealth Ct. 527, 541 A.2d 40 (1988), appeal denied, 521 Pa. 623, 557 A.2d 726 (1989).

[5]The income approach or capitalization method is used to appraise income producing real estate by dividing the annual net rental income (gross income minus expenses) expected from the property by the investment rate of return (the capitalization or "cap" rate) for that property. (Citation omitted.)

Pennypack Woods Home Owners Asso. v. Board of Revision of Taxes, 163 Pa. Commonwealth Ct. 80, 88, 639 A.d 1302, 1305 (1994).

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clearly in error. We disagree.

In order to determine the fair market value, there are three methods of valuation.[6] Section 402(a) of the General County Assessment Law (Assessment Law), Act of May 22, 1933, P.L. 853, as amended, added by Section 6 of the Act of November 13, 1982, P.L. 1160, 72 P.S. §5020-402(a), requires that a county consider the fair market value of the property utilizing each valuation method before choosing the method it determines would fairly reflect the value of the property. Walnut-Twelve Associates v. Board of Revision of Taxes of City of Philadelphia, 131 Pa. Commonwealth Ct. 404, 570 A.2d 619, appeal denied, 525 Pa. 652, 581 A.2d 577 (1990).[7]

In this case, the Masters determined that the comparable sales approach[8] was the most reasonable and accurate method to determine the fair market value of the property in question. Our review of the record indicates

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[6] These three methods are cost method, comparable sales approach (market approach) and income approach (capitalization method).

[7] See also C N G Coal Co. v. Greene County Board of Assessment and Revision of Taxes, 121 Pa. Commonwealth Ct. 443, 551 A.2d 328 (1988).

[8] The comparable sales approach sometimes called the market approach arrives at a fair market value by considering the sale of a similarly situated property of the same type and class sold recently at a given price. Appeal of Avco Corp., 100 Pa. Commonwealth Ct. 616, 515 A.2d 335 (1986).

BEST AVAILA

that the Masters did indeed consider, review and analyze all three methods in conjunction with each other before determining which method to employ. Further, the Masters' Report clearly outlines the rationale behind their choice of the market approach and, thus, we will not disturb the Masters' decision.

Third, taxpayer argues that it was denied due process because the Masters' Report contained "facts and opinions" which the taxpayer was not allowed to cross-examine. Taxpayer claims that, because the Masters' Report contained "opinions" concerning the location of the taxpayer's land, which the taxpayer did not cross-examine, it was denied due process rights. This argument is puzzling. All such reports contain "opinions" based on the evidence presented. The Masters discussed the basis for their opinion and the taxpayer did have the opportunity to cross-examine all testimony and evidence introduced. Therefore, taxpayer was not denied its due process rights to cross-examine.[9]

Accordingly, the decision of the Court of Common Pleas of Allegheny County is affirmed.

EMIL E. NARICK, Senior Judge

---

[9]The taxpayer also alleges that the Masters violated Section 518.1(a) of the Assessment Law, 72 P.S. §518.1(a). However, the taxpayer fails to properly develop this argument and indeed does not even point to the inadequacies of the Masters' opinion. It is not the duty of this Court to determine or develop a legal argument when one is not presented in a clear and concise manner. See generally Pa. R.A.P. 2119. Therefore, we will not further discuss this issue.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ABELE ASSOCIATES, Pennsylvania Limited Partnership, Appellant	:	
v.	:	No.1556C.D. 1994
THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW ASSESSMENT, APPEALS AND REVIEW	:	

ORDER

AND NOW, this 21st day of April, 1995, the order of the Court of Common Pleas of Allegheny County is hereby affirmed.

EMIL E. NARICK, Senior Judge

APPENDIX "B"

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE:	CIVIL DIVISION
ABELE ASSOCIATES, Pennsylvania Limited Partnership,	Case No.:GD91-00625 Issue No.: 143899 Board of Viewers: BV1944
Appellant	
v.	NOTICE OF REPORT OF SPECIAL MASTERS AND ORDER
THE BOARD OF PROPERTY ASSESSMENT, APPEALS REVIEW	Code 120 TAX ASSESSMENT APPEAL
Appellee	Filed on Behalf of:
	JOHN L. MUSMANNO Administrative Judge Civil Division
	COPIES TO: Patrick J. Loughney, Esq. Ira Weiss, Esq.
	For the Appellant: David F. Alpern, Esq.
	For the Appellee: John M. Silvestri, Esq.
	For the School Board: W. Theodore Brooks, Esq.
	For the Township: Vincent A. Tucceri, Esq.

MASTER'S REPORT

To the Honorable, the Judges of said Court: the Masters appointed in the above entitled case respectfully report as follows:

I. That, by order of Your Honorable Court dated October 30, 1992, Gay Banes, Esquire, was appointed as Special Master, and Joseph F. Cosnak and Carmen V. DeChellis were appointed Lay Masters to hear the entitled tax assessment appeal.

II. That the subject property is owned by Abele Associates whose address is Secon Associates, 2585 Washington Road, Pittsburgh, PA 15241. It is known as Block and Lot #9946x83804 as identified in the Deed Registry Office of Allegheny County. It is located in South Fayette Township.

III. That the Board of Property Assessment, Appeals and Review of the County of Allegheny assessed the subject property for tax purposes for the land and buildings and determined its market value to be as follows:

ABELE ASSOCIATES

Year	Lot and Block	Assessment	Market Value
1990	9946 x 83804	326,500	$1,620,000
1991	9946 x 83804	426,000	1,704,000
1992	9946 x 83804	426,000	1,704,000

IV. That subsequent thereto, the owners filed an appeal with this court alleging that the assessment by the Board of Property Assessment, Appeals and Review was inequitable and arbitrary and did not reflect the market value of the Property.

V. That pursuant to the order of Your Honorable Court, and after due notice to all parties interested, three days of hearings were held before the aforesaid Masters.

VI. That at the aforesaid hearing the Masters heard all the testimony and other evidence as presented by all the interested parties, said parties being represented by counsel.

VII. That having heard the quantity and quality of the evidence presented by all of the interested parties, and having considered all of the testimony of the parties, as well as arguments of counsel, we the Masters, report as follows:

a. That assessment and fair market values of real estate in Allegheny County are levied on a ratio of 25% for the years, 1990, 1991, 1992 and 1993.

b. Counsel of the Board of Assessment placed into evidence a copy of the account transcript from the Deed Registry assessment blotter for the years 1990, 1991, and 1992 for the subject property identified as Exhibit A credible evidence. By stipulation the parties agreed that your Masters include in their report the assessment and market value for 1993. The account transcript appears

Year	Lot and Block	Assessment	Market Value
1993	9946 x 83804	426,000	$1,704,000

VIII. Testimony of E. Louis Averbach, a licensed real estate broker and appraiser

qualified as an expert witness for Appellant, owner.

He testified he was engaged around April 1, 1991 and made one visit in mid 1991 to the site in South Fayette Township. All of his testimony was based upon written documents including income and expense statements, sales agreements, tenant/lease rentals, plans, photos, and construction/cost information furnished to him by Corace, the builder and developer.

Averbach considered all three approaches to value but relied principally on the income approach. He negated the market or comparable sales approach because the buildings were not finished and were combination warehouse/ office space. He further reasoned that special purpose tenants required lease improvements not usable by subsequent tenants. He did not include the cost of tenant improvements in his appraisal nor did he testify with specificity these costs attributed to a dentist tenant or computer company tenant.

The owners purchased the subject tract of land on December 4, 1986, for a consideration of $760,000. The prior owner had begun development of the site by making cuts and fills, grading of access roads and foundations, the value for which was included in the consideration. By the terms of the sales agreement, some of the work was to be completed after the closing by the seller.

The new owners continued site development by constructing four office/warehouse, single story, flex space buildings on 6.5 acres of the total 18.654 acre tract. Two acres of the

6.5 acre part were used for access roadways. Averbach described the balance of the land or 12.35 acres as "hilly, not functional" and did not assign any monetary value to the land in rendering his market value opinions. He also stated "The topography was of such a nature that it could not be utilized."

Appellants' photographs, Exhibits A and B, picture from a distance, four attractively designed and constructed, red brick single story buildings.

Each is set on a low rise, mounded earth area with landscaped grass areas at the front and sides. The rear of the buildings are at ground level with loading docks and service entrances. Their appearance from the front project themselves as being in a campus like setting.

Averbach repeatedly vacillated his description of the buildings and use without providing details for any of them.

He described the buildings as having flat roofs. Appellants' Exhibits A & B, picture the roofs flat at the rear but on the front and sides, we must conjecture, were designed and built to appear as an attractive hip and mansard style construction roof.

He also described the buildings as light industrial. Later he elaborated the buildings are a combination of warehouse and office facilities. He mentioned a dental and computer company tenancy as being different and unusual. Your Masters consider such users commonplace in today's business world through more expensive than ordinary retail or sole warehouse/storage space.

Each building has central heating and air conditioning with a loading and receiving dock at the rear.

He gave no other testimony to describe any external or internal construction or finish details.

In his testimony, he emphasized the importance of the starting and completion dates and occupancy and therefore could not use the market or comparable sales approach to value because the buildings were not finished and fully occupied.

Building No. 1 was under construction as of January 1, 1990. Its gross area is 21,648 square feet with 15,496 square feet finished and has a rentable area of 19,200 square feet. It was completed as of January 1, 1991.

Building No. 2 was under construction as of January 1, 1990. Its gross area is 14,904 square feet with 13,115 (86%) finished and has a rentable area of 12,880 square feet. It was completed as of January 1, 1991.

Building No. 3 was under construction as of January 1, 1992. Its gross area is 13,800 square feet with 1,380 square feet (10%) finished and has a rentable area of 11,937. It was completed as of January 1, 19[illegible].

Building No. 4 was under construction <u>after</u> January 1, 1991. Its gross area is 13,800 square feet and has a rentable area of 11,937 square feet. It was completed as of January 1, 1992.

Averbach listed 3 comparable sales in his appraisal report marked Appellants' Exhibit C.

(1). Allegheny County IDA to Man Roland Inc. in January 1991, 21st Ward, Pittsburgh, Block and Lot 7-M-2, North Side. Pittsburgh for a consideration of $3,756,925. In June 1992, it was resold to the Carnegie Science Center for $3,217,500.00 or $14.22 per square foot land and building. Its gross area is 226,327 square feet. It is an industrial building with a 26 foot ceiling with three on track cranes, an enclosed air conditioned mezzanine and a basement 32,327 square feet of locker space, wash rooms and fully equipped kitchen.

(2). Sale from Frank H. McKean to Gross Street Corp., on May 4, 1990, located on Cypress Street, Block & Lot 51-J-210 with a totally functional land area of 6.887 acres for $1,950,000 or $13.00 per square foot, land and building. The site is improved with factory and commercial buildings having a gross area of 150,000 square feet. It is located in the central Bloomfield area of Pittsburgh. It is an old mixed commercial, business and residential area.

(3). Sale from Robert J. Casey to Valspar Corp. 3125 Preble Avenue, 27th Ward, Pittsburgh, June 3, 1991. The land area is 5.7 acres with well constructed industrial type buildings having a gross area of 192,000 square feet. The consideration was $1,575,000 or $8.20 per square foot, land and buildings.

Based on market or comparable sales approach to value his market value opinion "as a fully completed project including Buildings 1, 2, 3, and 4" was $995,000 or $15.51 per square foot, land and buildings.

Based on the income approach to value applying a capitalization rate of 10% his

market value opinions were
for 1990 - $500,000
for 1991 - $630,000
for 1992 - $1,500,000

In Exhibit C, Averbach describes the cost approach to value as most relevant only in cases of special purpose properties and is normally only applied as a check on estimates of value by other approaches. The report also contains a mystifying statement: "The cost of an improvement cannot be recovered regardless of its cost if the improvement is an investment property developed solely for the purpose of generating a return on the Investment."

Based on costs submitted by the developer for the subject property of $2,164,000, Averbach calculated the per square foot cost of the entire project to be $33.73.

In summary, Averbach disregarded the cost approach, considered the comparison (comparable sales approach) and conclusions for his market value opinions as follows:

for 1990 - Five Hundred thousand dollars ($500,000)

for 1991 - Six hundred thirty thousand dollars ($630,000)

for 1992 - One million five hundred thousand dollars ($1,500,000)

IX. Testimony of William G. Corace, the general partner, identified as a part owner, builder and developer.

He testified that the partnership decided

to develop their 18.85 acre tract as Phase 1 containing 9.49 acres with 6.35 as usable and Phase 2 containing 9.36 acres with 5.1 acres as usable. He confirmed the purchase price shown on the deed as $760,000 and gave lengthy testimony concerning the sales agreement provisions for completion of access roads, grading and other work to be performed by the seller, road costs, hard and soft costs and financing.

Corace described the buildings as light industrial with prefabricated, steel superstructure, 12 feet ceilings with square footage from 21,000 to 13,800. They are surrounded with masonry walls with metal roofs. The front portions of the buildings can be designed for office, clerical or showroom areas. They have loading docks and overhead doors which are typical for almost every business commercial or industrial use at the rear.

Again, there was lengthy testimony about completion start and percentage completion dates, occupied buildings with landscaping and dock facilities to be completed and costs.

Typically the shell is constructed and the interior is not completed until leased. If Building 1 cost $488,000, 50% is attributed to the shell and 50% to the interior improvements. Since it is flex space, in most cases all improvements are at the cost of the landlord.

The following Exhibits were admitted into evidence:

C-1 Abele Associates - 1 Income/Expenses Statement 1989, 1990, 1991

D-1 Abele Associates - Summary Data

D-2 Abele Associates - Phase I - Tenant Above Standard Construction costs, Improvement costs, Amortized cost

D-3 Description of flex space and theory of breakout of tenant improvement costs

D-4 Unidentified site plan (with no distances of dimensions) locating six (6) buildings

E-1 Abele Associates - Income/Expense Statement 1992

Corace also testified that Exhibit 1 lists standard or basic finish costs and tenant requirement interior finish costs separately and are included in the total cost of the building. He also testified that in many cases above standard improvements have been totally removed for the next tenant.

His market value opinions were:

as of January 1, 1990 --- $735,000
as of January 1, 1991 ---$1,035,000
as of January 1, 1992 -- $1,700,000

X. Testimony of Robert B. Nell, Jr., a licensed real estate broker certified appraiser, and expert witness, for the South Fayette Township School District.

a. He visited the site in March of 1992 and February of 1993, and made an exterior inspection of the buildings and prepared a written report which was placed into evidence as Taxing Bodies Exhibit No. 1 dated January 8, 1993. He utilized all three approaches to value, cost, market and income

and rendered market value opinions for the tax years 1990, 1991, 1992, 1993.

b. He identified the site as the Abele Business Park and listed percentage completion for four (4) buildings for the '90/'91 period. All buildings were completed as of January 1, 1993. The site contains 16.75 acres of which 5.9 acres was considered excess but suitable for future development. The Buildings are designed for multiple tenant occupancy and are identified as number: 100, 200, 300 and 400. They contain a total rentable area of 50,174 square feet.

c. He described the construction and design features of the buildings including a concrete block (fluted) perimeter on the foundation, decorative wood exterior, decorative roof facade, flat roof structure, gas forced air heat with central air-conditioning. Each building has various percentages of office space and warehouse space with loading bays.

d. Cost Approach. He utilized an estimated land value of $70,000 per acre, a depreciated cost for the site improvements was added at $250,000. Replacement cost estimates were obtained from the Marshall Valuation Service. He added 10% for entrepreneurial profit. Depreciation was deducted based on an effective age of two years and economic life of 45 years. His indicated value by the cost approach for the entire project as completed for 1993 based on a gross area of 64,150 square feet x $41.51 per square foot (Marshal Swift) was $4,205,000.

d.1 He gave limited weight to the cost approach. He initially prepared his cost

approach analysis since the first step involves land value and assigning value to the excess land.

e. Comparable Sales

e.1 Land Sales

In his appraisal report, he detailed eight land sales which he verified. Sale no. 3 was from Hickory Hill Associates to Cintas Corporation No. 13 a 5.2 acre tract contiguous to the subject property. The consideration for the sale on April 2, 1991 was $364,000 or price per acre of $70,000. William Corace, general partner of Abele Associates is one of the grantor owner's of Hickory Hill Associates.

e.2 Land and Building Sales

Nell also detailed six recent sales of office/engineering buildings similar in quality and design to the subject. The comparable were reduced to design to the subject. The comparable were reduced to a price per square foot of gross building area, a method widely recognized in the market. Personal opinion value factor adjustments were then considered and made for differences which value such factors as location, building age/condition (which determines the effective age), percentage of office space, to warehouse, storage, and land/building ratio. Rental data suggests that the market recognizes the difference between new and existing construction. Consideration was given to the replacement cost of the various building features and or quality. After making the necessary adjustments, the adjusted unit values of the comparable per square foot

were $57.74, $61.70, $60.63, $57.14 and $58.24.

e.3 Comparable Sales - Conclusion

These support an indicated market value for the subject property of $57.00 per square foot or 64,150 S.F. x $57.00 \S.F. or $3,656,550. Plus the excess land value (5.9 acres at $70,000 per acre = $413,000 or an indicated value for subject by the comparable sales approach of $4,069,550 rounded to $4,070,000.

f. Income Approach to Value

f.1 In his calculations, he utilized the gross potential income based on the actual income reported for buildings, 1, 2, and 4 and projected for Buildings 3 at $9.00 per square foot for a gross annual income of $552,375 less a 5% vacancy allowance leaving an effective gross income of $524,756.

f.2 To arrive at his net income before taxes, he factored in expenses for management of 5%, maintenance of $25,000 and actual experience deductions for water/sewage, insurance and trash totaling $72,638 for a net income of $452,118.

f.3 Using a capitalization rate of 10% plus a tax load of 3.6% gave him a loaded cap rate, of 13.6% and an indicated market value of 3,324,000. He added an excess land value of 5.9 acres at $70,000 per acre or $413,000 to arrive at his income approach indicated property value for all land and buildings of $3,737,000.

g. Conclusions - Three approaches

to value

g.1 In Nell's opinion appraisal report, he established annual market values for land and buildings for each year as of January 1990, 1991, 1992 and 1993 based on gross area completed for each year at a unit cost of $41.51 per square foot. Utilizing his previous analysis and computations, he applied the following factors as functions to establish his values: (1) potential value of Building 2 (86% complete), less cost to finish, less lease-up allowance and profits, (2) plus the excess land value minus expenses allowed.

g.1.1 By the cost approach as of January 1, 1990 - $1,230,000

g.1.2 By the income approach as of January 1, 1990 - $1,110,000

g.1.3 By the market approach as of January 1, 1990 - $1,220,000

g.1.4 His final market value opinion for land and building as of January 1, 1990, was $1,200,000.

g.2 As of January 1, 1991, Building 1 and 2 were complete. Building 4 was 10% complete, and its value was disregarded. In his calculations, he used a gross area of 36,550 square feet completed at a unit price of $41.51 per square foot for the cost approach and $57.00 per square foot for the market approach. He made the same analysis and computations he used for 1990 and rendered his market value opinions as follows:

g.2.1 By the cost approach as of January

1, 1991, $2,600,000

g.2.2 By the Market approach as of January 1, 1991, $2,583,000

g.2.3 By the income approach as of January 1, 1991, $2,346,000

g.2.4 His final market value opinion for land and buildings as of January 1, 199 was $2,500,000

g.3 As of January 1, 1992, Buildings 1, 2 and 4 were complete and Building 3, 50% complete. For the cost approach, he used a gross area of 64,150 square feet and unit cost of $41.51 per square foot and $57.00 per square foot unit cost for the market approach. He made the same analysis and adjustment factors, he used for 1991 and rendered market value opinions as follows:

g.3.1 By the Cost approach as of January 1, 1992, $3,591,315

g.3.2 By the Market approach as of January 1, 1992, $3,309,000

g.3.3 By the Income approach as of January 1, 1992, $2,976,000

g.3.4 His final market value opinion for land buildings as of January 1, 1992 was $3,000,000

g.4 For the year 1993, he rendered market opinions as follows:

g.4.1 By the Cost approach, $4,205,000

g.4.2 By the Market approach, $4,010,000

g.4.3 By the Income approach, $3,737,000

g.4.4 Nell considered all three approaches to value in rendering his final conclusion and market value opinion for 1993 of $3,800,000, for 1992, $3,000,000, for 1991 of $2,500,000 and 1990 of $1,200,000.

XI. Summaries and Conclusions - Masters

a. That the subject parcel of land with improvements thereon, is owned by Abele Associates, a Pennsylvania limited partnership, appellant and consist of 18.654 acres of land located in South Fayette Township Allegheny County. It was purchased on December 4, 1986, for a consideration of $760,000.

b. The land is typical Western Pennsylvania irregular terrain with hills, valleys, and deep gullies. It is bordered on the North and West by farm land and forest interspersed with small coal mining towns. The site was under construction on the date of purchaser being graded for building sites with an access and service road to other parts of the site. One or more foundations were in place with an infrastructure of sanitary sewers, surface water drainage with sewers, a drainage water retention basin and underground utilities for gas, water, electricity and communication lines. The site improvement costs were included in the deed consideration of $760,000.

c. Assessment transcripts identify

the tract as Abele Business Park and list unofficial subdivisions and redivisions of it as parcels A, B, C, and D with acreage assigned and construction Phases I, II, III, and IV. Testimony also identified Phases V and VI. The location of this site is not identified.

The 1990 transcript lists the tract as 18.554 acres shown on the deed. The 1991, 1992, and 1993 transcripts list it variously as 16.873 and 16.774 acres.

d. Location Factor

There is a rote expression in the expert real estate appraisal vernacular that three most important factors in determining market value are LOCATION, LOCATION, LOCATION. We are agreed on the importance of this factor, but neither of Appellants' witnesses presented any testimony to describe the subject property's location and many factors which make it desirable for business investment. Your Masters know the site.

Abele Exhibit D-4 (not identified) is part of a survey (we assume) of the subject land abutting Old Pond Road at an unidentified Exit to I-79. We were able to trace it by identifying the road near the Bridgeville Boro exit, No. 11. From public records, it is seen as a small one square mile Borough with a 1990 population of 5,443. It has been a satellite town "housing" the labor force and businesses surrounded by some major industries since World War I and very important in World War II. I-79 has brought growth to the surrounding townships.

No plan or survey was placed into

evidence to enable us to better understand appellant's utterly garbled testimony.

We conclude and find that the subject property is a prime location for business investment superior to Nell's RIDC Business Park.

e. Appraisal - Methodology - Unit value.

An essential part of every appraisal process is to give easily recognized meaning to a market value opinion of land alone, the building alone and land and building combined in a unit value i.e. COST OR VALUE PER SQUARE FOOT. We believe it necessary that we outline the proper methodology which a skilled, knowledgeable, real estate appraiser uses and applies to provide credible testimony. Appellants use of the square foot unit value was sporadic without adjustments unrelated and unreliable.

Calculation of a unit value for comparison, provides the common denominator used by appraisers by which comparable sales, income and cost approach values, and the subject property can be related to each other. APPRAISAL FACTOR ADJUSTMENTS must first be made for location, total land, size, zoning, date, site view, design and aesthetic appeal, quality of construction, building foot print conformation, condition, size, overall gross areas and cubic volume, total building area, depreciation, all forms of obsolescence, calendar age, effective age, and economic life. The process consists of the appraiser assigning PERSONAL OPINION percentage and minus or plus dollar values to the factors, calculating market values based on each

approach to value to relate them to the subject then rendering his final market value opinion.

Neither of Appellant's witnesses applied this essential methodology in rendering any market value opinions.

f. Testimony - Overview

An overview of the testimony and evidence presented on behalf of appellant discloses an evolving appraisal theory widely practiced in the decade of the eighties identified as "creative appraising." Rather than setting a market valuation for the subject property on the basis of an independent arms length transaction, appellant's expert witness, Averbach, and general partner, Corace, simply sought to justify their market value opinions on a skewed cost and income basis colored with a jargon of mostly irrelevant testimony and exhibits on financing, construction and hard and soft costs and fees and tenant specification finish costs performed by the owner, required to complete flex space, which became a part of the real estate.

They also constantly confused the sole issue of market value of the improved land for each tax year by persisting in their testimony that the deed consideration of $760,000 for the subject property and $364,000 for the Cintas tract did not represent the true per acre market value of the land since the sales agreements required the sellers to make site improvements which Averbach and Corace theorized and segregated as construction costs. These included earth grading and public utility infrastructure installations.

The purpose of the hearing viz. to receive testimony fixing market values for the subject property in a tax assessment setting was obfuscated in a potpourri of unintelligible, irrelevant, repetitive, rhetoric describing construction costs, phases, parcels, "a road up a hill to a plateau" usable and unusable acreage, financing and interest costs, allocating costs of the road and infrastructure on the subject land to adjoining land parcels owned, sold or managed by Corace.

He testified to six parcels off site including the Cintas comparable which was identified as the Phase III tract. By dividing these costs impermissible among his separate projects during his testimony, enabled Corace to testify to reduced costs and market values for the subject land. The confusing testimony or lack of it by Appellant's witnesses Averbach and Corace continued.

No testimony was offered to explain the meaning or reasons for designating unofficial subdivisions and redivisions of the subject 18.554 acres without deed transfers shown on the assessment transcripts as Parcels, A, B, C, and D - with changing assigned acreage and construction Phases I, II, III, IV, V, and VI. Only Parcels A & B and Phases I & II were located on the subject property during the testimony.

We were also surprised when Corace testified on the last day of our hearings that Phase III was not on the subject property. These transcripts encompass the appeal period before the Board.

These transcripts were also important to your Masters since both witnesses early in the hearings referred to Parcels "A" assigned 13.603 acres of land and Plan Parcel "B" 3.17 acres - Total 16.873 acres of land on the 1991 Transcript (NOT 18.554 acres which was the entire subject property). These changed from 1990 thru 1993.

The testimony assigned varying acreage to the parcels and were frequently referred to as usable acreage and impermissibly excluded the "unusable" or non-functional acreage with NO MARKET VALUE. The Phase and parcel designations remain a mystery.

We conjecture or postulate that the designations constituted unofficial sub-divisions of the subject land for leasing purposes or sale to new separate partnerships by the owners.

It was all irrelevant to the ultimate issue: market value of the property as a whole-land and buildings as of January 1 for the subject years. Constant reference to these parcels and Phases during the hearings continued to confuse that issue.

This information is also important since the witnesses impermissibly assigned different market opinion values to raw or undeveloped usable land though the infrastructure site, preparations were already underway on the date of the closing and by and large completed on the date of inspection when the expert witnesses visited the site for appraisal purposes. The raw land had been converted into improved land.

We conclude and find that as the grading

an infrastructure work proceeded, it added value to the land and became improved land and had value of $70,000 per acre. This was confirmed in Nell's appraisal report and his testimony that improved land in business parks is sold as improved to the curb or road.

We have also reviewed Averbach's three cited comparables for their comparability factors. None can qualify as a comparable sale based on the importance of the location factor outlined on page 19 of this report, nor on any other factors such as age, size, construction features, commercial use or tenant class or demographics.

We easily distinguished Averbach's comparables from the Abele Business Park. The subject land and modular pre-fabricated buildings are in a business park contiguous to a fast growing area. The buildings are one story with gross footprint areas of 13,800 square feet to 21,648 square feet with flex space for multiple tenancies. The buildings are targeted for a special class of professional and small businesses. None of Averbach's comparables could fulfill their requirements.

The comparables listed under section VII - can be distinguished in brief:

(1) Carnegie Science Center Parcel. Location, 21st Ward, Pittsburgh, North Side, fronting on the Ohio Rivers at "the Point". The area has been under redevelopment for 40 years including interstate ramps and highways. It is an industrial building next to the new Science Center and Three Rivers Stadium. It has 26 foot ceilings and (3) track cranes. The site is 226,326 square feet or 6.25 acres.

Its unadjusted value is $15.48 per square foot.

(2) Gross Street Corp. Parcel - It is located in an old closely built-up, mixed, industrial, commercial business and residential area in Pittsburgh's Bloomfield section with narrow streets. The gross building area is 150,000 square feet on 6.887 acres of land. The unadjusted unit value is $13.00 per square feet.

(3) Valspar Corp. Parcel - Preble Avenue, 27th W. North Side, Pittsburgh. Industrial type buildings between the Ohio River and Pa. Route #65, a limited access highway in a highly industrialized area. The gross area is 192,000 square feet or 5.7 acres. The unadjusted unit value is $8.20 per square foot.

Averbach made no attempt to apply recognized appraisal methodology principles, plus and minus adjustments to relate them to the subject simply because it is utterly impossible to recognize even one common factor which could be adjusted.

These comparables are rejected as not comparable. They represent a feeble attempt to give salutary recognition to the "comparable sales approach" to value in his appraisal report and testimony.

Averbach's repetitive rhetoric could not create facts needed to render acceptable market value opinions based in recognized appraisal principles and logical, analytical conclusions.

Averbach rendered market value opinions

for the subject property based in all three approaches to value but relied on the income approach.

A. Market or comparable sales approach "as a fully completed project included Buildings 1, 2, 3, and 4.

$995,000 land and buildings or $15.48 per square foot (Note: no date specified. The testimony indicates the last building No. 3 was completed as of January 1, 1993).

B. Income approach to value.

He qualified his 1990 value for the reason that the net income was not sufficient to give him a fair market value. He substituted his personal professional opinion value.

as of January 1, 1990	$500,000 land and buildings
as of January 1, 1991	$630,000 land and buildings
as of January 1, 1992	$1,500,000 land and buildings
as of January 1, 1993	$2,842,000 land and buildings

Averbach and Corace were so enamored with their theory that the pre-engineered modular buildings with flex space were so unique and unusual that they ignored basic, elementary appraisal principals. They "espoused" some new appraisal principles in their cost and income approaches to market value: First, that the land should be appraised as raw land through it became improved land when it was graded for building sites with a complete

infrastructure to make the buildings operational and second, that tenant specification finish cost improvements which attached and became part of the real estate could be segregated in a lease amortized monthly and be excluded from gross income for appraisal valuation purposes. Neither is supported by statutory or case law.

Through-out our three days of hearings until the last hour of testimony, your Masters labored with the understanding and conclusion that all the testimony referred to development of the subject 18 acre/16 acre tract of land identified in the transcript exhibit as "Abele Business Park" with multi-designations of Parcels and Phases.

In that last hour of testimony, Nell (witness for the Appellees) Cintas comparable came under direct and cross examination with re-direct examination of Corace and Averbach. At that time, we learned that Corace was also the owner of a contiguous 66 acre parcel of land partially sub-divided. It is also identified as the "Abele Business Park."

This shed light on his testimony that six out parcels of real estate (including Cintas) receive public utility service connections and sanitary sewer and storm sewer connections including the retention basin through and from the subject property. These include the service and access road.

This now also explained frequent mystifying reference to allocating part of the costs of the access road, retention basin and infrastructure to out parcels. It must be emphasized that none of these are a part of the subject 18.654 acres of land.

C. Findings and Applicable Laws

We find that Averbach impeached his credibility when he testified:

.01 that the infrastructure improvements to the land to provide sites for operational buildings did not add value to the land and continued to value it during his testimony as raw land.

.02 that he divided the subject land into Parcels, appraised them in sections as "usable" and non-functional or unusable acreage, and assigned no monetary value to the latter, though in fact, the entire tract was planned for development and had at least its raw land value of $27,000 per acre.

.03 that he could not use the market or comparable sales approach to value during construction since the buildings were not complete when, in fact, by applying valid recognized appraisal principles, he could have generated acceptable market value opinions to testify as an expert witness.

.04 that he impermissibly excluded part of the rental income representing tenant finish costs from gross income in calculating his market values for the land and buildings, though he admitted that the finish work in the buildings attached to the real estate and added value to the buildings.

.05 We also find that Averbach impeached his credibility when he testified he received all of his costs, rent rolls, finance and income information from Corace, the general partner, utilized in calculating his cost and market values and made no independent investigation of rental income from comparable properties to

confirm his conclusions.

.06 he failed to appraise the subject land and buildings as a whole as mandated by law between a willing buyer and willing seller in an arms length transaction by developing acceptable per square foot dollar values and market values for each approach to value for each tax year by applying recognized appraisal principles, techniques and methodology.

For the foregoing reasons, we therefore, conclude and find that he did not act as an independent expert witness and assign little weight to his testimony.

D. Findings and Applicable Law

Testimony of William G. Corace, as an Appellant, owner. We find that Corace impeached his credibility when he valued the improved land at his purported cost price of $27,000 for the raw land and his market values for the subject land and buildings solely on the basis of his own costs without developing any testimony to prove the market value of his land and buildings in an arms length transaction between a willing buyer and a willing seller.

E. Applicable Law and Appraisal Principles

Since Appellant's testimony was so vague and confusing, we are impelled to more fully cite statutory and case law and review appraisal principles to clarify numerous issues raised. The valuation of real estate for taxation purposes is governed by the General Assessment Law 72 PS 5020-202, etc.

Section 402 (provides in part):

01. "It shall be the duty of .....assessor to rate and value all objects of taxation ..... according to the actual value thereof and at such rates and prices for which the same would separately bona fide sell .... In arriving at the actual value, all three methods, namely cost (reproduction) or replacement, as applicable, less depreciation and all forms of obsolescence, comparable sales, and income approach must be considered in conjunction with one another."

02. Valuation for real estate assessment purposes is considerably more limited in scope than other conventional appraisals made for business valuation purposes. In the context of real estate assessment law, the only permissible subject of taxation is real estate.

03. Real Estate must be valued as a whole. While it may be common practice for a county assessor, on his assessment records to allocate separate valuations to land and buildings and improvements, in an assessment appeal, the court must evaluate the property as a whole unit. North Park Village Inc. v. Board of Property Assessment, 408 Pa. 433, 184 A-2nd 253 (1962) Pa. 249, 209 A 2nd 383 (1965).

04. Real estate is land plus any personal property permanently affixed to it and also includes any building or structure with all of its utility fixtures under Pennsylvania's traditional law of fixtures together with all other improvements including roads and pavings and any underground pipes, sewers, utility lines or structures classified as on-site infrastructure. There are a few statutory and case law exceptions excluding machinery and

equipment and television towers.

05. In Pennsylvania, the term "market value" consistently has been defined as the price which a purchaser willing but not obliged to buy would pay an owner willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied, 391 Pa. 94, 137A:2d 273 (1958); Deitch Company v. Board of Property Assessment, 417 Pa. 213, 209 A.2d 397 (1965), U.S. Steel Corporation v. Board of Assessment, 422 Pa. 463, 23 A.2d 92 (1966).

06. PERMITTED METHODOLOGIES TO DETERMINE MARKET VALUE

a. In determining market value, many factors are relevant and all must be considered and directed in determining the value of the property in the market. Appeal of Park Drive Manor, 380 Pa. 134, 10 A.2d 392 (1955).

b. Where applicable, all three methods of valuation should be considered in conjunction with one another. However, a court need not consider all three methods if one or more is not considered helpful or appropriate. Appeal of Duquesne Club, 92 Pa. Cmwlth. 15, 498 A.2d 459 (1985).

c. It must be noted that all techniques of valuation essentially rest upon the empirical evidence of the market place. Market value means value in the market or value in-exchange or not value in-use.

d. In a tax assessment appeal setting, the law is well established that only value in-exchange or fair market value is relevant. Pittsburgh-Des Moines Steel Co. v. McLaughlin,

77 Pa. Cmwlth. 565, 466 a.d. 1092 (1983) footnote 5 at p. 569.

e. To be a credible witness, it is the unalterable due of an appraiser to consider all the factors which create value or detract from value of a parcel of unimproved or improved land applying, and considering all the known and recognized factors in accordance with ethical appraisal procedures and principles and in compliance with statues and decision law authorizing assessment of real estate for tax purposes making personal value factor adjustments and rendering a market value opinion for the entire parcel as a whole, land and buildings.

f. An appraiser must avoid a valuation based upon attributes of the property or its ownership which relate primarily to the individual needs and circumstances of the current used or owner based in accounting practice or financing (as distinguished from attributes having general application to a variety of possible users and owners).

g. Cost Approach to Value

In the cost approach, the appraiser obtains an indication of value by estimating the underlying land's value and adding to it his estimate of the depreciated reproduction cost of the buildings and other improvements. The cost approach rests upon the proposition that an informed purchaser would pay no more than the cost of producing a substitute property with the same utility as the subject property.

However, event with respect to newer facilities, the Commonwealth Court has

indicated that a property's fair market value may have little to do with the cost of its construction. The relevant inquiry is value in the marketplace--not the amount of initial investment the particular owner decided to make. See City of Wilkes-Barre I.D.A. v. Board of Tax Assessment Appeals, 89 Pa. Cmwlth. 182, 492 A.2d 113 (1985).

h. Income Capitalization Approach

The income capitalization approach has its greatest usefulness in the valuation of income-producing rental property, such as an apartment building or a commercial office or retail sales building, because the average investor in such property purchases it in order to receive future benefits from rental income. In using the income approach, the appraiser converts an estimate of income expectancy into an indication of market value: i.e., the anticipated stream of net income is factored by an appropriate capitalization rate. This capitalization rate represents the relationship between income and value as demonstrated by the marketplace for similar or competitive properties.

i. Sales Comparison Approach to Valuation

The sales comparison approach (sometimes called the market data approach) is essential to almost every appraisal of the value of real property. This technique of valuation, literally, supplies the definitional basis for Pennsylvania decisions which define actual value: The price which a purchaser, willing but not obliged to buy, would pay an owner, uses to which the property is adapted and might in reason be applied. The definition is based on the assumption that both buyer and

seller are fully informed as to the property and state of the market for that type of property, and that the property has been exposed in the open market for a reasonable time.

The application of this approach produces an estimate of value of a property by comparing it with similar properties of the same type and class which have been sole recently or are currently offered for sale in the same or competing region. The process used to determine the degree of comparability between two properties involves judgment concerning their similarity with respect to many value factors such as location, construction, age and condition, layout and equipment. See Lynstan Tax Assessment Case, 28 Monroe L.R. 255 (1973).

j. Owners' Right to Testify as a Valuation

Judge Cappy, in an erudite opinion in a tax assessment appeal case at GD-No. 86-150229, in the Court of Common Pleas in Allegheny County, addressed the general issues in the case. Your Special Master cites some portions of the opinion.

The law is clear that an owner of property may testify as a "qualified valuation expert" and may give his opinion as to fair market value in tax assessment appeals. Hoffman v. Commonwealth, 422 pa. 144, 221 A.2d 315 (1966); Skleder v. Board of Property Assessment, Appeals and Review of Allegheny County, Pennsylvania, City of Pittsburgh, No. 1717 C.D. 1987, Commonwealth Court, decided July 8, 1988 unreported. This right is consistent with Section 704 of the Eminent Domain Code, 26 P.S. 1-704.

The owner who testifies as a valuation expert is to be treated as any other witness who expresses an opinion. Scavo v. Dept. of Highways, 439 Pa. 233, 266 A.2d 759 (1970); Faith United Presbyterian Church v. Redevelopment Authority, 7 Pa.Com. Ct. 490 298 A.2d 614 (1972); Skleder v. Board, supra. The weight to be given to an owner's testimony on how he arrived at fair market value is within the sound discretion of the trial judge (Master).

In addition, this Court sees no prohibition to an owner testifying as an expert witness provided that he is qualified on record as any other expert witness. Qualification of an expert witness is within the discretion of the trial court (Master). City of Phila. v. Sorrentino, 95 Pa. Com. Ct. 236, 505 A.2d 373 (1986). The standard as set forth in Sorrentino is,

"...[if] a witness has any reasonable pretension to specialized knowledge on the subject under investigation he may testify and the weight to be given his testimony is for the jury (fact finder/Master.) Id. at 240, 505 A.2d at 375. There is no requirement that said expert witness acquire expertise as a result of formal schooling; expertise acquired by experience is expertise nonetheless."

Gottfried v. American Can Co., 339 Pa. Super. 403, 411, 498 A.2d 222, 226 (1985).

k. TRIAL COURT'S (MASTER'S) DECISION AS TO VALUE:

It is the duty of the trial court (Master) to determine the fair market value of the property based upon the competent evidence

as presented at trial. Commonwealth Trust Co. of Pittsburgh Appeal, 88 Pa. Com. Ct. 618, 491 A.2d 929 (1985). Therefore, the Court (Master) is to determine the weight of the expert's opinions in accordance with and after evaluating the reasons on which the opinion is based.

It is within the role of fact-finder that the trial court (Master) may arrive at a fair market value by choosing between or among the values offered by the competent witnesses. The Court (Master) may choose the testimony of the expert witness presented for either side. Or, the Court (Master) may choose a value between those valuations offered by said expert witnesses.

City of Pittsburgh Appeal, 92 Pa.Com.Ct. 15, 498 A.2d 459 (1985) allocatur denied 522 A.2d 1106 (1987). In all cases it is incumbent upon the Court (Master) to set forth its choice and the reasoning on which it relied in concluding a certain valuation. If the Court (Master) finds one expert better qualified and/or more credible than the other, so be it. If the Court (Master) concludes that none of the experts are correct and instead sets froth a proper formulation of factors to be considered in determining the fair market value, as did the Court in Phila. and Reading Coal and Iron Co., 323 Pa. 185, 189, 186 A. 105, 108 (1936), so be it. It is wholly within the discretion of the trial court (Master) to make an independent valuation of the properties in question so long as said independent valuation is based upon the evidence before him and adequate reasons for the conclusion are set forth on record. "IBID."

1. Exception to the Hearsay Rule

Nell's appraisal report describes the land as 16.75. He relied on the assessment records for this information. It is a public record. The deed describes the land as 18.654 acres. Reliance on outside sources by an appraiser is an exception to the "hearsay rule".

Your Special Master dismisses any contention that this is material error, as "de minimis". Since total land acreage must be appraised, if Nell had used the higher acreage, his market value opinion would have been higher.

"The use by a testifying valuation expert of facts and figures derived from others and of which he himself does not have personal knowledge occurs frequently and is not a new development.

To require direct personal knowledge by the expert witness would be to require the impossible. That there my have been some hearsay evidence comprised within opinion evidence is undeniable. The components of an expert's opinion, however, go to weight not admissibility. Appeal of Pittsburgh Outdoor Advertising Corporation 440 Pa. 321, 272 A.2d 163 (1970), also see B.P. Oil Company, Inc. v. Delaware County Board of Assessment Appeals - Pa. Cmwlth. -- .539 A.2d 473 (1988).

Mr. Nell's appraisal report.

We have made a thorough review and analysis of Nell's Appraisal Report. He outlined its purpose, functions, scope, assumptions and limitations to provide an

unbiased report as an independent appraiser. His report evinces a thorough understanding of applicable laws and ethical appraisal practices and principals.

We find that Nell's appraisal and testimony were more credible and superior by far than Averbach's.

o. We find that the quality and weight of the countervailing testimony and evidence presented by Appellee taxing body has successfully rebutted the presumption of the validity of assessments for the subject property for years 1990, 1991, 1992 and 1993.

p. We also find that Appellants case as presented by its witnesses was not persuasive, lacked cohesion and credibility in making a factual presentation which was deficient in may respects in complying with standards enunciated in statutory and case law and ethical, appraisal principles to confer validity to their assumptions, conclusions, and market value opinions.

None of their testimony for their market values could be considered to have been taken in or founded in the many factors necessary to support a fair market value or actual value based in the land and buildings as a whole: "the price which a purchaser, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied in an arms length transaction after having been exposed in the open market for a reasonable time."

q. After review of all the testimony and evidence we find and adopt Appellant's witness, Nell's market values as most credible

and recommend to the Court that the assessment and market values for the subject property be as follows:

ABELE BUSINESS PARK, SOUTH FAYETTE TOWNSHIP, ALLEGHENY COUNTY

As of Jan. 1 Year	Assessed Value	Market Value
1990	300,000	1,200,000
1991	625,000	2,500,000
1992	750,000	3,000,000
1993	950,000	3,800,000

Block and Lot
9946x83804
" "
" "
" "

In concluding our recommendations, we gave consideration to the fact that Nell made appropriate personal opinion factor percentage reduction adjustments considering the larger size and construction quality of his RIDC comparable buildings. Though we sustain Nell's market value recommendations, we also must note that we made no upward adjustment in market values for the superior location factor of Abele Business Park to meet the owner's target market which in our opinion would not be fully served by the RIDC location.

Respectfully submitted:

Gay Banes, Special Master

Joseph J. Cosnek, Lay Master

Carmen V. DeChellis, Lay Master

APPENDIX "C"

MEMORANDUM OPINION

MUSMANNO, A.J.

I. Procedural History

The instant tax assessment appeal came before this Court on objections to the Report of the Special Master. Initially, the property was assigned an assessed valuation of Four Hundred Five Thousand Dollars ($405,000) for a fair market value of One Million Six Hundred Twenty Thousand ($1,620,000) by the County of Allegheny. The taxpayer filed an appeal to the Board of Property Assessment, Appeals and Review which reduced the assessed valuation of the property to Three Hundred Twenty-Six Thousand Five Hundred Dollars ($326,500), for a fair market value of One Million Three Hundred Six Thousand Dollars ($1,306,000) for the year 1990.

The taxpayer filed a timely appeal from this determination and this Court appointed the Board of Viewers as Special Masters to hear the evidence and prepare a report.

During the pendency of the hearing, testimony was received as to tax years 1991, 1992 and 1993.

The Board of Viewers further reduced the value of the property in 1990 to an assessed valuation of Three Hundred Thousand Dollars ($300,000) and a fair market value of One Million Two Hundred Thousand Dollars ($1,200,000). The Special Masters, however, found the following values for the years 1991 through 1993 inclusive:

1991	$625,000	$2,500,000
1992	$750,000	$3,000,000

1993	$950,000	$3,800,000

The taxpayer filed timely Objections to the Report of the Special Masters which were briefed and argued before this Court.

II. Factual Background

Initially, the taxpayer purchased the land in question for development in December of 1986 at a cost of Seven Hundred and Sixty Thousand Dollars ($760,000.00). Although the evidence was unclear, the parcel consists of approximately sixteen (16) to eighteen (18) acres of developed land with four flex space office/warehouse buildings erected on a portion thereof. The buildings were completed at various times during the pendency of this appeal.

The taxpayer, a Pennsylvania limited partnership, presented the testimony of its general partner, as well as an expert real estate appraiser in support of its valuation figures. Interestingly, the testimony of the taxpayer's general partner and the taxpayer's expert differ significantly for all tax years in question.

Both the taxpayer's general partner and the taxpayer's expert, however, opined that a significant portion of the site costs must be "backed out" of the valuation figures as they represented roads and other infrastructure improvements which are utilized for access by neighboring parcels. No authority for this unique proposition, however, was set forth. In addition, the taxpayer's expert deleted 12.35 acres of the site from consideration as "not functional."

The taxpayer's expert opined that he relied primarily upon the income approach to the property as neither the cost approach nor the comparable sales approach yield satisfactory results.

In opposition thereto, the taxing bodies presented the testimony of their expert who based his opinion on the cost approach, the comparable sales approach and the income approach. This expert provided cost information based upon the Marshall Swift evaluation service, income approach figures based upon rent rolls provided by the county assessor, and seven comparable sales including sales of similar if somewhat superior buildings and land adjacent to the subject parcel.

The Special Masters, after three days of testimony, concluded that the taxpayer's general partner and expert were not credible, and found the testimony of the taxing bodies' expert to be credible and adopted his evaluations as the findings of the Special Masters.

III. Discussion

The objections of the taxpayer fall into three basic categories, namely errors of law, errors in failing to accept the testimony of the taxpayer as credible, and a claim that the Masters relied on personal knowledge outside the record.

First, the taxpayer's claim of errors of law are without merit. It is well settled that a court (or its Special Masters) must hear testimony as to the fair market value of a property based upon all three recognized

approaches to valuation, i.e. replacement costs, income and comparable sale approaches. In this case, the Special Masters did exactly that. Contrary to the taxpayer's claims, the Special Masters heard testimony regarding the status and completion of all buildings on the site and made appropriate adjustments in their findings. Further, the Special Masters heard and evaluated testimony regarding the nature of the comparable sales and whether they were in fact superior or inferior to the subject property.

Second, the taxpayer complains because the Special Masters did not accord the testimony of its general partner or expert much credibility. The determination of credibility, however, is within the discretion of the trier of fact, and in the absence of abuse of that discretion, should not be disturbed. See, Mapp v. Wombucker, 421 Pa. 383, 219 A.2d 681 (1966). The taxpayer has not raised any objections which constitute an abuse of discretion.

Third, as to the taxpayers claims about personal knowledge of the Special Masters, the claim ignores the facts of record. The Masters based their findings on all three approaches, adjusting the values of the superior comparable sales set forth by the taxing body where appropriate. Specifically, the Special Masters disregarded their own opinion in not making upward adjustment when they stated:

> "...we must also note that we made no upward adjustment in market values for the superior location factor of Abele Business Park to meet the owner's target market which in our opinion would not be

fully served by the RIDC location."

In short, the Masters did not inject their own opinion as to the superior location of the subject property as claimed.

In sum, then, the Masters simply determined credibility adversely to the taxpayer. This was based in part upon the differing testimony between two representatives of the taxpayer, as well as the rather unique evaluation procedures utilized by the taxpayer, none of which are supported by law.

IV. Conclusion

For the foregoing reasons, therefore, this Court will overrule the objections of the taxpayer and adopt the Report of the Special Masters as its own. An appropriate Order will follow.

BY THE COURT:

_____,A.J.

Date filed:

ORDER OF COURT

AND NOW, to wit, this day of , 1994, after consideration of the Objections of the taxpayer to the Report of the Special Masters, and after review of the record, and briefs and argument of counsel thereon, it is hereby ORDERED, ADJUDGED and DECREED that the Objections of the taxpayer to the Report of the Special Masters be, and same are hereby overruled. It is further ORDERED that said Report on the recommendations contained therein are incorporated herein by reference and are adopted as the final adjudication and Order of this Court.

BY THE COURT:

_____, A.J.

APPENDIX "D"

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ABELE ASSOCIATES, Pennsylvania Limited Partnership, Appellant	:	
v.	:	No.1556C.D. 1994
THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW ASSESSMENT, APPEALS AND REVIEW	:	

O R D E R

NOW, May 31, 1995, having considered appellant's application for reargument and answer in opposition filed by South Fayette School District, the application is denied.

BY THE COURT:

JAMES GARDNER COLINS,
President Judge

APPENDIX "E"

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

ABELE ASSOCIATES, Pennsylvania Limited Partnership,	:	No. 359 Western District Allocatur Docket 1995
Appellant v.	:	Petition for Allowance of Appeal from Commonwealth Court
THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW	:	
ASSESSMENT, APPEALS AND REVIEW	:	

O R D E R

PER CURIAM:

AND NOW, this 12th day of March, 1996, the Petition for Allowance of Appeal is hereby DENIED.

Madame Justice Sandra Schultz Newman did not participate in the consideration or decision of this matter.

A True Copy Amy J. Ceraso, Esq.
as of: March 12, 1996
Attest:
Deputy Prothonotary
Supreme Court of Pennsylvania

Supreme Court, U.S.
FILED
AUG 26 1996
OFFICE OF THE CLERK

No. 96-136

In The

Supreme Court of the United States

October Term, 1995

ABELE ASSOCIATES,
a Pennsylvania Limited Partnership,

Petitioner,

vs.

BOARD OF PROPERTY ASSESSMENT,
APPEALS & REVIEW,

Respondent.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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School District Solicitor
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17 pp

QUESTION PRESENTED

Did Petitioner receive due process pursuant to the Fourteenth Amendment to the Constitution of the United States in connection with the hearing before the Special Masters in this real estate tax appeal?

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STATEMENT OF THE CASE

This Petition for a Writ of Certiorari is an attempt by Petitioner, Abele Associates, a Pennsylvania limited partnership ("Abele"), to overturn a real estate tax assessment on certain property located in South Fayette Township, Pennsylvania ("Property") rendered after a full hearing before a board of viewers, a body created by the County of Allegheny to rule on real estate tax assessment appeals. The local taxing bodies are the South Fayette Township School District and South Fayette Township. The Property is identified as a flex space office/warehouse park. Abele initially appealed a decision of the Board of Property Assessment, Appeals and Review of Allegheny County setting assessed values for the Property. This appeal resulted in a hearing, with testimony and evidence submitted to a Board of Viewers ("Masters"). Subsequent to the hearing before the Masters, a Masters Report ("Masters Report") was submitted to an Administrative Judge for the Court of Common Pleas of Allegheny County, Pennsylvania. The detailed Masters report summarizes the evidence and testimony presented over three days of hearings, and sets forth the Masters findings and opinions based upon said evidence and testimony.

After Objections were filed by Abele to the Report of the Masters and respective briefs were filed on behalf of Abele, the South Fayette Township School District ("Respondent"), and the Township of South Fayette which is the local municipality where the property is located, the Administrative Judge entered an Order adopting his prior Memorandum Opinion and Order of Court dated May 19, 1994. Abele's objections were overruled and the Masters' Report was adopted as the final

adjudication and Order of the Common Pleas Court of Allegheny County.

Thereafter, Abele appealed the Common Pleas Court Order to the Commonwealth Court of Pennsylvania and, after briefs and arguments, the Commonwealth Court affirmed the Order of the Court of Common Pleas by Opinion (unpublished) and Order dated April 21, 1995. Abele thereafter applied to the Commonwealth Court for reargument and Respondent filed an Answer thereto. By Order dated May 31, 1995, Abele's Application for Reargument was denied by the Commonwealth Court.

Subsequently, Abele filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. On or about March 12, 1996, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal.

During the parts of three days over which the hearing was held before the Masters, Abele and the taxing bodies were given ample opportunity to present evidence and cross-examine witnesses. Testifying for Abele were E. Louis Averbach ("Averbach"), an independent real estate appraiser, and William G. Corace ("Corace"), the principal partner of Abele. Testifying on behalf of Respondent was Mr. Robert B. Nell, Jr., MAI, SRA ("Nell"), a representative of an appraisal firm.

Evidence was presented by all witnesses regarding the valuation of the Property and opposing counsel was given the opportunity to cross-examine and otherwise challenge or rebut the testimony and evidence.

In making their findings, the Masters recognized the importance of the Property's location. The Masters noted,

however, that "neither of [Abele's] witnesses presented any testimony to describe the subject property's location and many factors which make it desirable for business investment." (Abele Appendix B, p. 25)

After thoroughly reviewing the testimony and evidence submitted by Abele's appraiser Averbach, the Masters concluded that he was not acting "as an independent expert witness" and the Masters assigned "little weight to his testimony" (Abele Appendix B, p. 25). The Masters also found that the testimony of Abele's principal partner, Corace, should be given little weight because he valued the land based upon unsupported cost estimates. (Abele Appendix B, p. 35). In regard to Respondent's expert, Nell, the Masters found that in his appraisal report, he "outlined its purpose, functions, scope, assumptions and limitations to provide an unbiased report", and that his "appraisal and testimony were more credible and superior by far than Averbach's." (Abele Appendix B, p. 44)

In conclusion, the Masters found that Abele's "case as presented by its witnesses was not persuasive, lacked cohesion and credibility in making a factual presentation which was deficient in many respects in complying with standards enunciated in statutory and case law and ethical appraisal principles to confer validity to their assumptions, conclusions, and market value opinions." (Abele's Appendix B, p. 44)

Upon the completion of the testimony and the submission of documentary evidence, the Masters made findings of facts and conclusions of law, and established

assessed values for the Property for the tax years 1990 through 1993.

ARGUMENT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING CERTIORARI IN THIS CASE.

As clearly delineated in Rule 10.1 of the U. S. Sup. Ct. Rules, 28 U.S.C.A., review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 10.1 illustrates the character of reasons which may be deemed "special and important" and includes cases

> When a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1(c) of the U.S. Sup. Ct. Rules, 28 U.S.C.A. Abele relies upon this consideration in seeking certiorari (Petition, p. 11).

Not all federal questions decided by state courts are reviewed by this Court, however. As this Court stated in considering the similar language of former Rule 19 of the U.S. Sup. Ct. Rules, 28 U.S.C.A,

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular

> litigants [citation omitted]. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 73-74 (1955).

Abele does not contend that the Commonwealth Court attempted to overrule or ignore legal precedent established by this Court. Rather, Abele contends that the appropriate legal principles were improperly applied to the specific facts of this case. The question posited by Abele is whether the Masters were biased or prejudiced so as to deny Abele due process (Petition, first unnumbered page). The resolution of this question involves only the peculiar facts relating to these particular litigants. As such, this case is of no significance to the general public.

As recognized in *Rice*, this Court does not sit for the benefit of particular litigants or to resolve purely episodic problems. There is nothing about this case which implies a reach to matters of general public importance. There are, therefore, no special or important reasons why this Court should issue a writ of certiorari, and Abele's petition should be denied.

II. THE MASTERS DO NOT HOLD A DIRECT, PERSONAL, SUBSTANTIAL, PECUNIARY INTEREST IN THE SUBJECT PROPERTY SO AS TO VIOLATE THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In addition, this Court need not grant certiorari because the Commonwealth Court correctly applied the

law. Abele claims that the evidence shows bias and prejudice by the Masters. This contention is without merit.

It has been recognized that only in the "most extreme cases" will bias or prejudice be found to a degree necessary to find a violation of the due process clause. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986). This court has held that before a charge of judicial bias and prejudice can be found to violate due process, it must be found that the judge has an interest which is "direct, personal, substantial [and] pecuniary". *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Although the degree of interest has been found to be difficult to define, one formulation is whether the:

> situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clean and true".

Ward v. Village of Monroeville, supra, 409 U.S., at 60, citing *Tumey v. Ohio*, 273 U.S. 510 (1927).

Abele points to three statements in the Masters report which it claims demonstrates bias and prejudice, but absent from Abele's argument is any allegation that the Masters held a direct, personal, substantial and pecuniary interest in the tax appeal in question or the real estate involved therein. Even if the three quotes cited by Abele from the Masters Report do, in fact, demonstrate prejudice or bias (which Respondent vehemently denies), Abele's argument fails as a matter of law because there is no allegation or indication that the prejudice and bias rise to the level required by the *Ward* and *Tumey* decisions.

Indeed, the cases cited by Abele involve facts substantially distinguishable from the tax appeal in question. Furthermore, the cases cited by Abele demonstrate the extreme extent of bias and prejudice necessary in order to sustain a finding of a denial of due process under the Fourteenth Amendment.

In Re Murchison, 349 U.S. 133 (1955) involved a Michigan criminal procedure which permitted the same judge to conduct a secret grand jury investigation and thereafter conduct a public trial on the contempt charges brought by him for conduct occurring during the grand jury investigation. This Court decided that the dual role of the judge in the secret investigation stage and the public trial stage brought about a deprivation of due process. Additionally, this Court found that the judge brought personal knowledge and information from the grand jury investigation that could not be tested by adequate cross-examination. No such dual role is present in this case, and the Masters are not alleged to have brought personal knowledge from a secret investigation not subject to common knowledge. In fact, they merely acknowledged that they were aware of the location of the property since it is located alongside a major interstate highway.

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), involved a provision of the Fair Labor Standards Act providing that fines collected for violation of the act be paid to the Department of Labor. This Court found that the due process clause of the Fifth Amendment was not violated by the dual role of the Department of Labor in assessing and collecting civil penalties because the "forbidden possible temptation . . . is too remote and insubstantial to

violate the constitutional constraints applicable". *Id.* at 243.

Abele cites *Johnson v. Mississippi*, 403 U.S. 212 (1971) for the proposition that a "trial before an unbiased judge is essential to due process." However, no bias has been demonstrated by Abele and the facts in that case are substantially different from the tax appeal in question. The *Johnson* case involved contempt proceedings against a civil rights activist conducted two years after the alleged misbehavior, wherein the judge himself had been a losing party in civil rights suits commenced by the same defendant.

Not only has Abele failed to allege any direct, personal, substantial and pecuniary interest on the part of the Masters as required by the *Lavoie, Ward* and *Tumey* decisions, any interest that can be inferred by the circumstances would certainly be "too remote and insubstantial to violate constitutional constraints." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 825; *Marshall v. Jerrico, Inc.*, 446 U.S. at 243.

III. ABELE RECEIVED ALL REQUISITE DUE PROCESS PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN THIS TAX APPEAL.

An examination of the record herein also clearly reveals that Abele received all due process to which it was entitled in connection with this tax appeal. Due process is a flexible concept and the nature of the process that is mandated by that concept will vary depending upon the particular circumstances of the case. *Mathews v.*

Eldridge, 424 U.S. 319 (1976). The elements of due process include adequate notice, an opportunity to be heard, and a chance to defend oneself before a fair and impartial tribunal having jurisdiction over the matter. *Id.* at 333.

A review of the Master's Report leads to the clear conclusion that Abele's rights to due process were never jeopardized or infringed upon. Abele was given the full opportunity to litigate its tax assessment appeal before the Masters and the court. At all stages of this process, Abele has been provided with the requisite elements of due process, including the right to confront and cross-examine witnesses. Abele has been given every opportunity to satisfactorily present credible evidence in support of its valuations, and Abele was unable to do so.

It is noteworthy that the statements referenced by Abele are *de minimus* when compared with the voluminous detail which the Masters digested in making their findings. Furthermore, the comments referred to by Abele must be read in the context of the whole Masters Report and not as separate items. Abele confuses "biased opinion" with findings and opinions based upon the entire record before the Masters. The Masters properly developed opinions as to the Property based upon the evidence presented and these opinions are fully supported by the evidence. This point was reiterated in the Commonwealth Court's decision.

The fact that the Masters found Abele's evidence insufficient and unpersuasive does not mean that the Masters were predisposed or biased. As the Commonwealth Court noted, and as referenced above, the Masters found that "Averbach was impeached on six specific

instances, exposing oversights and exclusions concerning the property in question." (Abele Appendix B, p. 34) The Masters Report also details several other instances which support the Masters' findings of the lack of credibility on the part of Abele's experts.

In regard to Averbach's description of the Property, the Masters note that "Averbach repeatedly vacillated his description of the buildings and use without providing details for any of them." (Abele Appendix B, p. 13). The Masters had difficulty understanding and interpreting Abele's experts' conclusion that the cost approach is only relevant in cases of special purpose properties. In conclusion, the Masters found:

> Averbach and Corace were so enamored with their theory that the pre-engineered modular buildings with flex space were so unique and unusual that they ignored basic, elementary appraisal principals.

(Abele Appendix B, p. 32)

The Masters also discounted much of Averbach's and Corace's testimony regarding the impact upon market value of sales contracts requiring the seller to make site improvements. The Masters stated that "the purpose of the hearing viz. to receive testimony fixing market values for the subject property in a tax assessment setting, was obfuscated in a potpourri of unintelligible, irrelevant, repetitive, rhetoric." (Abele Appendix B, p. 28)

In addition, the Masters received evidence from Abele which they viewed as impermissible cost allocation among different projects, lack of explanation for unofficial subdivisions, unexplained charges in total acreage

and impermissible exclusion of "unusable acreage" with no value attributed thereto. (Abele Appendix B, p. 28). As to all of this information, the Masters found that "it was all irrelevant to the ultimate issue: market value of the property as a whole – land and buildings as of January 1 for the subject years." (Abele Appendix B, p. 29)

Respondent submits that what Abele describes as "bias" by the Masters is merely the result of Abele's inability to meet its burden of persuasion in this tax appeal. It is clear that the Masters went to great length and detail to justify and support their credibility findings. The credibility findings are clearly within the discretion of the Masters. The Masters Report and Record also demonstrate that the Masters made no error of law in examining the evidence presented and determining the weight to be given contradictory expert witnesses. In short, the Masters' credibility findings are fully supported by the record and the record clearly demonstrates that Abele received all the due process to which it was entitled pursuant to the Fourteenth Amendment.

Even if the three statements referred to by Abele are based entirely on the Masters' knowledge, outside of the record, such "judicial notice" of common knowledge such as a property's location is permissible. Courts may take judicial notice of facts of universal notoriety, which need not be proved, and of whatever is generally known within their jurisdiction. *Brown v. Piper*, 91 U.S. (1 Otto) 37 (1875).

In summary, Abele's argument is flawed because it fails to acknowledge that the Masters formed opinions based upon the totality of the evidence presented. For

this reason, the Commonwealth Court correctly concluded:

> all such reports contain "opinions" based on the evidence presented. The Masters discussed the basis for their opinion and the taxpayer did have the opportunity to cross-examine all testimony and evidence introduced. Therefore, taxpayer was not denied its due process rights.

(Abele Appendix A, p. 6)

CONCLUSION

Abele has not alleged a special or important reason for granting certiorari as required by Supreme Court Rule 10.1. In addition, Abele has made no showing that the Masters held a direct, personal, substantial, pecuniary interest in this tax appeal. As a result, the standards enunciated by this Court for finding a due process violation based upon judicial bias or prejudice have not been met. Furthermore, even if bias or prejudice can be attributed to the Masters, it would certainly be too remote and insubstantial to support a finding of a denial of due process rights.

The record before this Court demonstrates that Abele was in no way deprived of due process in connection with the tax appeal. At all stages of the tax appeal, Abele was provided with the requisite elements of due process: adequate notice, an opportunity to be heard and a chance to defend itself before an impartial tribunal. Furthermore, Abele had the full opportunity to submit evidence, cross-

examine witnesses and rebut evidence. In short, Abele received all process which the law says is due.

The Masters properly relied upon the evidence which they found to be most credible and discounted evidence they deemed to be incredible. The Masters went into detail to explain the reasons behind their credibility findings. It was prudent for the Masters to discount the credibility of Abele's experts in light of the numerous inconsistent, irrelevant, confusing and unsupported testimony presented by Abele and its expert. The Commonwealth Court correctly found that the Masters' credibility findings are supported by the record, and were within the Masters' discretion.

For the foregoing reasons, it is clear that Abele has failed to demonstrate a special or important reason, as required by Supreme Court Rule 10.1, for granting a Writ of Certiorari in this matter.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 96-136

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ABELE ASSOCIATES, a Pennsylvania limited Partnership

PETITIONER,

v.

THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

RESPONSE TO PETITION FOR WRIT OF CERTIORARI FILED ON BEHALF OF SOUTH FAYETTE TOWNSHIP

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STATEMENT OF THE CASE

The Respondent is South Fayette Township, a Township of the First Class located in Allegheny County, Pennsylvania. The Respondent is one of three entities that taxes real estate property based on the assessed value assigned by Allegheny County.

Allegheny County initially assigned the Petitioner's property an assessed value of $ 405,000.00 based on the fair market value of $ 1,620,000.00 for the year 1990. Petitioner did not agree with the assessment and filed an appeal to the Board of Property Assessment which reduced the value of Petitioner's property to $ 326,500.00 based upon a fair market value of $ 1,306,000.00. The Petitioner then appealed to the Allegheny County Court of Common Pleas who assigned the case to Special Masters to conduct a hearing and prepare a Report. The assessed value of Petitioner's property was further reduced by the Master's Report to $ 300,000.00 based upon a fair market value of $ 1,200,000.00. (App. p.2-3). The Special Masters did recommend higher assessed values for the years 1991-1993. (App. p.45).

The Petitioner then filed objections to the Master's Report. The trial court overruled Petitioner's claims that the Masters relied on personal knowledge outside the record when making their decision. The trial court stated that by making such a claim, the Petitioner was ignoring the facts of record before the court. (App. p.50). The trial court found that the Master's findings were supported by all three approaches to determining assessed value and that the adjustments made by the Masters

based on the values proposed by the taxing bodies were appropriate. (App. p.50).

Petitioner then filed an appeal to the Commonwealth Court of Pennsylvania. Petitioner again raised the issue that it was denied due process because the Master's Report contained "facts and opinions," specifically "opinions" concerning the location of the land. (App. p.6). The Commonwealth Court found Petitioner's argument puzzling stating that all such reports contained "opinions" based on the evidence presented. (App. p.6). Accordingly, the Commonwealth Court affirmed the decision of the Court of Common Pleas of Allegheny County.

Petitioner then filed this Writ of Certiorari claiming a violation of its due process guaranteed under the Fourteenth Amendment.

ARGUMENT

I. THE PETITIONER WAS NOT DENIED DUE PROCESS PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION AND WAS GIVEN A FAIR AND UNBIAS HEARING IN FRONT OF THE SPECIAL MASTERS.

Respondent does not disagree with Petitioner that this Court considers cases where a state court has rendered an opinion on a federal question that conflicts with relevant decisions of this Court. However, the Respondent disagrees that there is any such conflict in the case.

Petitioner repeatedly emphasizes that trial before a non-bias Judge is essential to due process. Johnson v. Mississippi, 403 U.S. 212, 217, 91 S.Ct. 1778, 1780 (1971). Respondent does not dispute this, but in this instance there is no evidence of bias, and therefore no violation of due process.

A. The findings of the Special Masters are supported by facts in the record and were not based on a bias opinion.

Petitioner relies on three statements in the Master's Report that Petitioner claims evidence the bias it suffered. However, Petitioner ignores the remainder of the Master's Report where the findings of the Masters are based, not on personal opinion, but on all three recognized approaches to valuation of property for tax purposes, i.e. cost, income and comparable sales approaches.

The first comment alleged to illustrate this extreme bias suffered by Petitioner is when the Masters comment in the Report that they knew the location of Petitioner's property. Merely knowing where a block of land is located does not discredit the Master's findings when their findings are duly supported by facts in the record. The Master's statement that the Petitioner's land is a "prime location" is supported by the testimony of Respondent's tax expert who employed all three approaches to valuation when he made his Report. (App. p.18). Petitioner's second excerpt where bias is alleged is also a statement that is supported by the evidence presented by the Respondent's expert. (App. p.18).

A trial court's function in a tax assessment case is to properly weigh conflicting testimony and conflicting values proposed by each parties expert witness and to arrive at a fair market value based upon the credibility of those opinions. County of Monroe v. Bolus, 149 Pa. Commw. 458, 618 A.2d 178 (1992). The Masters performed their designated function of weighing the testimony presented and coming to a conclusion based on that testimony.

The Petitioner's expert was impeached on six different occasions. (App. p.34-5). The credibility of the owner of Abele Associates was also impeached. (App. p.35). The Masters found that Petitioner's testimony and evidence presented revealed an appraisal theory they referred to as "creative appraising." The Masters found that rather than,

...setting a market valuation for

> the subject property on the basis of an independent arms length transaction, appellant's expert witness,...and general partner,..., simply sought to justify their market value opinions on a skewed cost and income basis colored with a jargon of mostly irrelevant testimony and exhibits...(App. p.27).

It is within the Master's discretion to find the testimony of Respondent's expert more credible and superior to Petitioner's. (Pl.App. p.44). The Respondent's expert was found by the Masters to present a thorough understanding of the law and ethical appraisal practices and principals. (App. p.44).

Petitioner's third claim of bias in the Master's Report is actually a statement by the Masters emphasizing that they disregarded any opinion they may have as to the superior location of Petitioner's property. The Master's emphasized that their decision was based on the evidence presented before them by the experts and witnesses. (App. p.45).

B. <u>The comments alleged to show bias do not give rise to a due process violation.</u>

Petitioner relies on case law where judges were found to be biased against litigants before them. These cases are clearly distinguishable from the case before the Court. In <u>Johnson v. Mississippi</u>, 403

U.S. 212, 91 S.Ct. 1778 (1971), this Court found that bias existed where a judge presiding over a contempt proceeding had been a losing defendant in a civil right suit brought by a litigant before him. In finding that the judge should have recused himself, this Court pointed out that it did not rely solely on contemporate remarks made by the judge concerning civil right litigants. Rather, it was the prior negative contact the Judge had with the party standing before him that made it inappropriate for him to preside over a contempt hearing. Johnson, at 218, 1780. Petitioner can argue that the comments made by the Masters may have been unnecessary, but they do not show bias and do not give rise to a due process violation.

In In Re Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955), this Court stated that fairness requires an absence of actual bias in the trial of cases. There was no actual bias against the Petitioner, merely knowing where a block of land is located does not discredit the findings of a court that are based on facts presented by an expert. Petitioner did not suffer bias or prejudice during his hearing in front of the Special Masters as did the petitioners in Murchison or Johnson.

The Special Masters heard three days of testimony, including that of the general partner of Abele Associates, Abele's expert, and the expert of the taxing bodies. The Masters found that taxpayer's expert was impeached on six specific instances, exposing oversights and exclusions concerning the property in question. (App. p.34-5). The determination of credibility is within the discretion of the trier-of-

fact. The inconsistent testimony of Petitioner's expert, the deficiency of Petitioner in complying with the standards in statutory, case law, and ethical appraisal principles, supports the Master's determination of credibility (App. p.44). The Masters adopted the testimony of Respondent's expert which was fully supported by evidence and which was within their discretion.

The Petitioners were given a fair and impartial trial in front of an unbiased court. That the court found that the Petitioner and its expert lacked credibility is not a violation of Petitioner's due process. The decision of the Special Masters is fully supported by the record and should be affirmed by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

Vincent A. Tucceri

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